

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

<b>VIRNETX INC., and</b>	§	
<b>LEIDOS, INC.,</b>	§	
	§	
<b>Plaintiffs,</b>	§	
	§	<b>No. 6:12-cv-00855-RWS</b>
<b>v.</b>	§	
	§	
<b>APPLE INC.,</b>	§	
	§	
<b>Defendant.</b>	§	<b>JURY TRIAL DEMANDED</b>
	§	
	§	

**VIRNETX'S NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING  
OPENING STATEMENTS**

Pursuant to the Court's request at the March 20, 2018 Pretrial Conference, VirnetX

submits this Notice providing the Court with authority explaining that the ordering and timing of opening statements is a matter within the Court's discretion:

- *Son v. Muniz*, No. SACV 15-0020-PA(AJW), 2016 WL 3033689, at \*11 (C.D. Cal. Mar. 21, 2016) (In a criminal case, explaining that “[t]here is no clearly established federal law providing that there is a constitutional right to give an opening statement.” (collecting cases, and citing *Herring v. New York*, 422 U.S. 853, 863 n.13 (1975)));
- *United Sates v. Conti*, 361 F.2d 153, 158 (2d Cir. 1966) (“The trial court required appellants to choose between making their opening statements immediately after the opening statements of the prosecution, and not making them at all. This seems well within the trial court’s broad power to regulate the conduct and timing of a trial, and not prejudicial to the defendants.”), *vacated on other grounds*, 390 U.S. 204 (1968);
- *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir. 1978) (finding a district court’s refusal to allow a defendant to reserve opening until its case-in-chief to be harmless error.);
- *Grey v. First Nat. Bank in Dallas*, 393 F.2d 371 (5th Cir. 1968) (time limit on opening statement “is a question so clearly committed to the discretion of the trial judge that we would intervene only where there is an egregious abuse of that discretion.”);
- *E. Prop. Dev. LLC v. Gill*, 558 Fed. Appx. 882, 888 (11th Cir. 2014) (“[T]he right to open and conclude argument is a procedural matter governed by federal law, *see Lancaster v. Collins*, 115 U.S. 222, 225, 6 S.Ct. 33, 34–35, 29 L.Ed. 373 (1885), which rests within the district court’s discretion.”);
- *Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc.*, 2016 WL 7547687, at \*1 (W.D. Mich. Apr. 22, 2016) (“District courts have broad discretion to set and to establish the order of proofs at trial . . . .” (citing *United States v. Dittrich*, 100 F.3d 84, 86 (8th Cir. 1996)).

DATED: March 21, 2018

Respectfully submitted,

**CALDWELL CASSADY & CURRY**

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**ATTORNEYS FOR PLAINTIFF  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on this 21<sup>st</sup> day March, 2018. Local Rule CV-5(a)(3)(A).

/s/ Bradley W. Caldwell  
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